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12 IN THE UNITED STATES DISTRICT COURT
13 DISTRICT OF ARIZONA

14 United States of America,
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16 Plaintiff,
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18 vs.
19
20 Donald Day, Jr.,
21
22 Defendant

Case No. CR-23-8132-PCT-JJT

**OPPOSITION TO
GOVERNMENT'S MOTION TO
TAKE FINGERPRINTS**

23 The government seeks an order compelling Mr. Day to provide fingerprint
24 samples—evidence that the government already has and that it believes will
25 incriminate him further. Mr. Day declines to assist the government with its
26 prosecution. He respectfully urges the Court to decline the government's request to
27 compel it.

28 The government seeks additional fingerprint samples from Mr. Day to aid
its prosecution of a single charge against him: for allegedly being a felon in
possession of a firearm or ammunition. The government asserts that a latent
fingerprint was recovered on a receipt for ammunition; and another latent palm
print was discovered on the side of a box of ammunition. Both the receipt and the
box were seized in a search of Mr. Day's home. The government already took
"major case prints" from Mr. Day during booking; yet the government now seeks
additional fingerprint evidence from Mr. Day to further its investigation.

1 Two reasons counsel in favor of denying the government's motion:

2 *First*, the government's motion is premature. The government seeks Mr.
3 Day's fingerprint evidence only to further its prosecution for allegedly violating 18
4 U.S.C. § 922(g)—the felon in possession statute. Mr. Day has a pending motion to
5 dismiss the charge. *See* Motion to Dismiss (Dkt 41). And, as the Court is aware,
6 the law surrounding the charge is in considerable flux. A panel of the Ninth Circuit
7 recently declared the statute unconstitutional as-applied to an individual with
8 multiple prior felony convictions; that decision is presently pending rehearing en
9 banc. *See United States v. Duarte*, No. 22-50048 (9th Cir. 2024).

10 Trial in this matter was continued to allow the Ninth Circuit time to provide
11 additional guidance on the constitutionality of § 922(g). *See* Order (Doc 86).
12 Because of the present uncertainty surrounding the constitutionality of the
13 charge—and because the government only seeks evidence to support its
14 prosecution on this count—the Court should decline to order Mr. Day to submit to
15 fingerprinting until more clarity exists surrounding the constitutionality of the
16 charge, as-applied to Mr. Day.

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18 *Second*, the order the government seeks here—compelling Mr. Day to
19 provide additional evidence to aid in his own prosecution—is more constitutionally
20 suspect than the government lets on. An order forcing Mr. Day to submit to
21 warrantless fingerprinting raises Fourth Amendment concerns, especially where
22 the compulsion is sought to support an investigation for a charge of uncertain
23 constitutionality. *See Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (noting
24 reasonableness measured by legitimacy of the government's interest). Further,
25 although courts have recognized that routine fingerprinting for booking purposes
26 is outside the scope of the Fifth Amendment's protections, additional compelled
27 fingerprinting—solely to assist the government's investigation—may raise
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1 separate Fifth Amendment concerns. *See, e.g., United States v. Payne*, 99 F.4th
2 495, 513 (9th Cir. 2024) (upholding compelled use of thumb to unlock phone but
3 noting that “Fifth Amendment questions like this one are highly fact dependent and
4 the line between what is testimonial and what is not is particularly fine”). The Fifth
5 Amendment’s touchstone is that the government be required to “shoulder the entire
6 load.” *Schmerber v. California*, 384 U.S. 757, 762 (1966). The government should
7 be required to shoulder that load here—and conduct the investigation with the
8 evidence it already has.

9 * * *

10 For these reasons, the Court should deny the government’s motion to
11 compel additional fingerprinting.
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Respectfully submitted: September 3, 2024.

JON M. SANDS
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s/Mark Rumold
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